UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ARGO GLOBAL SPECIAL SITUATIONS FUND, ARGO DISTRESSED CREDIT FUND, BLACK RIVER EMCO MASTER FUND, LTD., BLACK RIVER EMERGING MARKETS CREDIT FUND, LTD., BLUEBAY MULTI-STRATEGY (Master) FUND, LTD., CARVAL (CVIGVF (LUX))MASTER S,a,r,l, STANDARD AMERICAS, INC., STANDARD BANK PLC., BLUEBAY SPECIALISED FUNDS: EMERGING MARKET OPPORTUNITY (Master) FUND,

Plaintiffs,

vs.

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Indenture Trustee, TRISTAN OIL, LTD., GLG ATLAS MACRO FUND, RENAISSANCE SECURITIES (Cyprus), Ltd., VISION ADVISORS III, LTD., SPUTNIK GROUP, LTD.,

Defendants.

Case No.: 0:10-cv-3614-SRN-JJG

TRANSCRIPT

OF

PROCEEDINGS

(MOTIONS HEARING)

The above-entitled matter came on for MOTIONS HEARING before Judge Susan R. Nelson, on April 7th, 2011, at the United States District Courthouse, 316 N. Robert Street, St. Paul, Minnesota 55101, commencing at approximately 1:30 p.m.

REPORTED BY: RONALD J. MOEN, OFFICIAL COURT REPORTER, CSR, RMR.

APPEARANCES

FAEGRE & BENSON, L.L.P., 90 South Seventh Street, Suite 2200, Minneapolis, Minnesota 55402-3901, by MICHAEL B. FISCO and MICHAEL M. KRAUSS, Attorneys at Law, appeared as counsel on behalf of Plaintiffs.

DORSEY & WHITNEY, L.L.P., 50 South Sixth Street, Suite 1500, Minneapolis, Minnesota 55402-1498, by STEVEN J. HEIM, Attorney at Law, appeared as counsel on behalf of Defendant, Wells Fargo Bank, National Association.

SALANS, L.L.P., 620 Fifth Avenue, New York, New York 10020-2457, by ANTHONY B. ULLMAN, Attorney at Law, pro hac vice; and

LARKIN, HOFFMAN, DALY & LINDGREN, Ltd., 7900 Xerxes Avenue South, Suite 1500, Minneapolis, Minnesota 55431-1194, by JON S. SWIERZEWSKI, Attorney at Law, appeared as counsel on behalf of Defendant, Tristan Oil, Ltd.

DEBEVOISE & PLIMPTON, L.L.P., 919 Third Avenue, New York, New York 10022, by MICHAEL E. WILES, Attorney at Law, pro hac vice; and

HENSON & EFRON, P.A., 220 South Sixth Street, Suite 1800, Minneapolis, Minnesota 55402-4503, by JOSEPH T. DIXON, JR., Attorney at Law, appeared as counsel on behalf of Defendants, GLG Atlas Macro Fund, Renaissance Securities (Cyprus), Ltd., and Vision Advisors III, Ltd.

THE COURT: Good afternoon, everybody. We are here this afternoon in the matter of Argo Global Special Situations Fund, et al., versus Wells Fargo Bank, et al. This is Civil File Number 10-3614. We are here to consider two motions, defendant Tristan Oil's Motion to Dismiss, and defendant GLG Atlas Macro Fund's Motion to Dismiss.

Let's begin by having counsel note your appearances.

MR. WILES: Good afternoon, your Honor. I'm Michael Wiles, from Debevoise & Plimpton, for Renaissance, GLG, and Vision.

THE COURT: Good afternoon.

MR. DIXON: Your Honor, Joe Dixon, of Henson & Efron, and I'm here today with Mr. Wiles, who will be doing the arguing.

THE COURT: Very good.

MR. ULLMAN: Good afternoon, your Honor. Anthony Ullman, from Salans. I represent Tristan.

MR. SWIERZEWSKI: I'm Jon Swierzewski, your Honor. I'm here with Defendant, Tristan Oil.

THE COURT: Very good.

MR. FISCO: Good afternoon, your Honor. Michael Fisco and Michael Krauss, from Faegre & Benson, on behalf of the Plaintiffs, affectionately known as the existing holder of the notes.

THE COURT: Okay. "Affectionately known," did you say?

MR. HEIM: Steve Heim, from Dorsey & Whitney, on behalf of Wells Fargo Bank, National Association, as Indenture Trustee.

THE COURT: Very good. Okay. I think we will hear the motions in the order in which they were filed. We'll begin with Tristan Oil's motion.

MR. WILES: If it's all right with you, your Honor, there are some issues that are common, and Mr. Ullman and I had agreed that I would argue those.

THE COURT: That's just fine.

MR. ULLMAN: I'll just comment briefly on those when he's done. But he'll take the lead on a number of them, your Honor.

THE COURT: No problem.

MR. WILES: Good afternoon again, your Honor. The last time I was here you asked me how I liked the temperature. I like it today much better. I think it's about 70 degrees warmer today than it was in February, when I was here.

THE COURT: Well, I hope you thanked your lead counsel for that.

MR. WILES: I did. I absolutely did. Also, if it's all right with you, I thought I would dispense with all

of the football arguments in our papers, unless you want to hear any of those again.

THE COURT: I kind of heard a little bit about that.

MR. WILES: Yeah, I figured you probably had enough of that over the last few days.

More seriously, you've heard us before, you've seen all the papers. You probably don't need me to give you any background about the parties and the transaction. I'm more than happy to do that if you would find it useful. Unless you would like it, I'll go straight into the argument.

THE COURT: I think you should go straight into your argument.

MR. WILES: Thank you. As we have pointed out, and I think this is undisputed, there is no subject-matter jurisdiction in this court unless there is diversity of citizenship. And that is only true if there is a U.S. citizen on each side of this dispute who is a real party in interest. All of the other plaintiffs, all of the defendants, with the exception of named defendant, Wells Fargo, are foreign parties. The case law is also clear that if Wells Fargo is just a nominal party, then it gets ignored for purposes of diversity jurisdiction. And the dispute between the parties is whether Wells Fargo does or does not fall into the category of what the cases describe as a

"nominal party." Now, on that point there is agreement that no wrongdoing has been alleged by Wells Fargo, and no claims have been asserted against Wells Fargo in the sense of "You breached 'X' duty to me," or anything like that. There is a claim for injunction that names Wells Fargo, that seeks relief against Wells Fargo, but not because of anything that Wells Fargo itself has done. It's there to facilitate relief in the event that a court were to rule on the basis of the claims that have been asserted against Tristan and against my clients, the new noteholders. And we submit under that set of facts that Wells Fargo is a classic nominal party. And one of the ways to think about this is -- I think a comment that you made the first time around, that's also picked up in the *Pesch* case that we've cited in our reply papers, that it's all well and good for plaintiffs to talk about how useful it is to have Wells Fargo in the case in facilitating the remedy that they want, but there's a distinction between the remedy and a cause of action, or the way you put it, I believe, was you have to have jurisdiction over the underlying claims in order to render a decision on those. And the only causes of action here that would give rise to a remedy are claims against Tristan and claims against the new noteholders. There is no claim against Wells Fargo. So the question for jurisdiction is do you have jurisdiction over the causes of action. And you plainly don't, because there

is no U.S. citizen against which any cause of action actually has been asserted. Now, what about the various things that plaintiffs have pointed to in their papers and supposedly making this different from the other cases. I think if you just line up those other cases, you can see that there's no difference whatsoever. One, the plaintiffs say: "Well, we're seeking an injunction." That's a different situation. Well, the case they cite for that proposition actually held that where an injunction was not sought and no relief was sought and no wrongdoing was alleged, the party in that case -- which I believe was the state of Florida, but it's hard to remember all the cases -- the party in that case was just a nominal plaintiff. That does not mean the opposite, that just because you ask for an injunction, you suddenly are no longer nominal. And, in fact, in many of the cases that we have cited to you, including the *Colman* case, which involved an executor, the *Wygal* case, the *Pesch* case, the *Prudential Real Estate Affiliates* case, and the *Alberto Culver* case, all of them included requests for injunctions, all of them were deemed to be nominal parties.

What about the argument that they need Wells Fargo because they have to tell Wells Fargo what to do with any money it receives from Tristan, and who to distribute it to. Well, that's always the case in practically every one of the nominal-party cases we've cited to you. It's true in the

Cherif case and the *Colello* case, which are the SEC cases, it's true in the *Andrews* case that we cited in our reply papers, which is explicitly an indenture trustee case, it's true of the *Colman* case, which involved an executor, the *Godley v. Valley View* case, *Walden v. Skinner*, an ancient Supreme Court decision, and the *Alberto Culver* case, again, which is one of the cases that plaintiffs rely on. All of those are situations where parties were named so that they could be told what to do with monies they held or would receive at the end of the case. They were deemed to be nominal parties.

Well, what about telling a party what to do with securities. Got examples of that, too, the *Prudential Real Estate Affiliates* case, and the *Pesch* case, each involving efforts to enjoin share transfers. You've also got the *Alberto Culver* case -- which isn't shares -- but it's whether or not an intellectual property should be returned to a party and taken out of the hands of the other party and of the trustee who was holding it. Those were all deemed to be nominal parties.

What about the argument that the remedy flows through the trustee. That's an argument that's repeated a number of times in the plaintiffs' papers. I have found no case that uses those words in describing what makes somebody a real party or a nominal party. And, in fact, one case --

which my friends representing Tristan had cited -- the *McNutt* case, actually goes the other way, where the governor of a state who sued, because technically in enforcing a sheriff's bond -- it was technically in the governor's name that the suit got filed -- the Court said that the state was a mere conduit through whom the law afforded a remedy as to the sheriff's bond. And as a mere conduit, it was a nominal party. So if remedies flow through the trustee, if the trustee is somehow a conduit through which money passes, that doesn't make him a real party in interest.

Do you have to have the trustee as a party to this case at all? Well, you know, all of their arguments are based on speculation, that if you kept this case, and if you entered a judgment in the favor of plaintiffs, that Wells Fargo at that point somehow would refuse to acknowledge it, that it somehow, despite your judgment if it got cash from Tristan, it would still try to give it to my clients. I find that inconceivable. Moreover, it is totally speculative and totally contingent. If somebody tried to bring a declaratory judgment action in front of you on that theory, you'd throw them out on their ear, because it's completely unripe, it's completely speculative, contingent, based on things that have not happened yet, and for the same reason there's no basis for Wells Fargo to be in the case right now.

How about the need to cancel securities,

another point they've cited. Well, under the indenture Wells Fargo doesn't even have any discretion. It's just a purely ministerial act. If you or any court that had jurisdiction over this were to order Tristan and the new noteholders to direct Wells Fargo to cancel the new notes, under the indenture Wells Fargo wouldn't have any right to refuse that. All it does is the ministerial act of canceling it. Those kinds of ministerial acts -- under the *Lincoln Property Company* case, a Supreme Court decision, those kinds of ministerial acts don't make somebody a real party in interest.

Now, the plaintiffs have taken language from cases that talk about naming of the party who has a duty to be performed. That's from the *Rose v. Giamatti* case. That you're a real party if you're the one who has the duty to be performed. But I think, with due respect, that that language has been misinterpreted. It doesn't mean that you are a real party just because it is useful to have you or just because you can make it easier to provide a remedy. The case law is very clear on that. And, in fact, if somebody wasn't useful to have in the case to provide a remedy, they wouldn't be defendants at all, let alone in the case as nominal parties. In all of the cases where parties are holding property, and they've been named as nominal parties so that the Court can tell them who to give the property to at the end, those

parties have distribution duties, too, but they were still nominal parties. That's true of all of the executors, all of the trustees, all of the escrow agents, the indenture trustee in the *Andrews* case, and the trustee in the *Walden v. Skinner* Supreme Court case. They have duties but they're not duties that are at issue in the case. That's what's important. And unless they are at issues in the case, unless there is a claim in the case that there was a violation of that duty, it is not relevant to the cause of action and does not confer subject-matter jurisdiction.

Now, there's another argument that the trustee actually should be the plaintiff in this case. They come right out and say it. But they allege that the reason that the trustee isn't a plaintiff is because he has a conflict of interest. I don't know that that's the case. I don't even know if the trustee thinks that's the case. I don't think anybody has asked the trustee; which is another point that I'm going to get to. But that hardly shows that the trustee is a real defendant in this case. What they need in order for there to be subject-matter jurisdiction is a U.S. citizen who is a real plaintiff and a U.S. citizen who is a real defendant. Arguing that the trustee is a real party by saying he should be a plaintiff doesn't solve the diversity jurisdiction problem. it doesn't put a real U.S. citizen on the defendant side of the equation, where there has to be

one. And to the extent that that's the argument, the Supreme Court's decision in the *City of Indianapolis* case is right on point. You don't line parties up based on whether the plaintiff has decided to put them above or below the "v." in the caption. You line them up based on where their real interests are. So if that's the argument, then the trustee should be viewed as a plaintiff. It does not give you jurisdiction.

What about the argument that the trustee has fiduciary duties because, after all of the things that are being complained about in this case happened, there was an event of default, in that in July of 2010 Tristan failed to make payments due on the notes. Well, maybe the trustee does or doesn't have heightened duties following that event of default with respect to those circumstances. But what does that have to do with the Complaints in this case; all of which focus on events that happened before that default occurred and at a time where everybody agrees the trustee did not have any such heightened duties, and at a time where not only is there no argument that the trustee breached his duties, there have been affirmative acknowledgements, at least in the probate court by the plaintiffs, that they don't believe the trustee violated any of its responsibilities. Now, I was scratching my head. The only thing I can figure is that this was somehow an attempt to take advantage of the

distinction in the *Navarro* case that appears in some of the cases between an active and a passive trustee. But if you look at those cases, those cases are situations where a court tries to figure out whether to treat a trust as a party or the beneficiaries as a party. And it has to do, really, with the legal stature of the entity. So that in *Navarro*, for example, it was a business trust. It was not a formal corporation. Do you treat it like a corporation or do you treat it like an unincorporated association, where the rules are different as to whose citizenship you look to for diversity purposes. We don't have that issue. Our issue here has nothing to do with the corporate capacity of Wells Fargo and whether, for example, we should be considering Wells Fargo's citizenship to be all of its owners as opposed to just Wells Fargo, or whether we should be considering all the investors in my clients as funds as opposed to the funds themselves. That's not the issue we have. The nominal party issue we have here has nothing to do with the nature of the entity who's been named but it's role in the case. And active versus passive has really nothing to do with that unless you want to use those words to describe a situation either where the trustee itself is actually suing to enforce a right that belongs to the trustee or where the trustee is being sued to defend against allegations that it has breached a duty that it owes. Now, if you want to use active and

passive labels -- I don't think that that's really what they're intended for -- but those would fit the case law. Those would be cases where the trustee is a real party. That's not the case here. The trustee has not sued, it has not been sued, except to be named as a party against whom relief is sought. No wrongdoing, just a party that is there for the purposes of relief. And I don't believe under any of those circumstances that you can properly view the trustee as anything but a nominal party. And since the trustee is a nominal party, you don't have subject-matter jurisdiction over this dispute.

Now, in addition, you don't have personal jurisdiction over the defendants. I'm going to obviously let Tristan's counsel make the argument as to the facts that relate to Tristan. But I want to adopt one point that Tristan made that actually we should have highlighted a little more than we did, too, that there's two steps in any personal jurisdiction analysis. You first have to look at the rules and see do the rules provide you with jurisdiction; and second, if they do, you have to ask yourself, are the rules consistent with due process limitations in giving you the right to -- or -- purporting to give you the right to exercise jurisdiction. But you've got to start with the rules. And it's not enough to quote cases that say that, "Well, the rules are consistent with the limits of due

process." In some ways they are, but the rule doesn't literally say: "This court shall exercise personal jurisdiction to the full limits of due process." That's not what it says. It actually has tests and standards as to when you can exercise jurisdiction. And unless plaintiffs can fit in one of those, you don't even get to the due process issues. And Tristan has done an able job of showing you that, under Minnesota Statute 543.19, this doesn't fit into the provision that would allow jurisdiction based on transacting business in Minnesota, because the case law is clear, sending letters, making telephone calls is not transacting business. It can't be based on the provision that is based on committing an act in Minnesota that causes injury because, again, the case law is clear, sending letters, making telephone calls are not acts within the state of Minnesota. The only thing left is the provision that deals with conduct outside of Minnesota that is alleged to have caused injury in Minnesota. There's no allegation here that any of these plaintiffs is a Minnesota resident or that any of the harms that they purport to have suffered was experienced in Minnesota. So the entirety of the argument that plaintiffs have made on personal jurisdiction ignores the statute. It's entirely a due process argument, that if the statute said otherwise, in their view they could have personal jurisdiction, consistent with the constitution. But

you can't just step over the statute. You've got to look at it. And Tristan has laid this out in great detail in one of the footnotes in its brief. It's absolutely clear, and I think it compels a determination, that there's no personal jurisdiction over either Tristan or the new noteholders.

Now, what about the due process issues, even if there were jurisdiction. The same statute I was just referring to makes clear that only causes of action arising from the enumerated acts would support jurisdiction. And the case law on due process makes clear -- nobody is alleging here that we're subject to general jurisdiction if you're talking about specific jurisdiction. The claim asserted against you has to be based on the contacts that you allegedly had with the state. Well, in that regard, it's very important in the case of my clients to look at what the claim is, because the plaintiffs don't distinguish. They just talk about the authentication of the notes, the affiliate provisions, et cetera. The breach-of-contract claim, which is Count I of the Complaint, is asserted only against Tristan. It is not asserted against my clients. My clients were not parties to that contract. We can't be accused of breaching the contract. The claim against my clients is that they bought notes from Tristan at such a low price that in plaintiffs' views that constituted a fraudulent transfer. Now, that has nothing to do with any of the events

that they say took place in Minnesota. Tristan issued notes to my clients and it did not subordinate that obligation to any other obligation. It took payment from them overseas, they were issued to my clients overseas. And that transaction happened sometime in June of 2009. That's the transaction that they claim injured them.

Now, the other events that they complain about had to do with making those notes subject to the indenture in this case, the authentication, when Tristan sent them to the trustee here for authentication, or had to do with later exercises of rights under the indenture, my clients' request for a merger of the notes. And they've tried to say that that's somehow all part of the same scheme. But it's not. First of all, it's not a scheme. It's supposedly a fraudulent transfer that they're complaining about. It is the transfer, the issuance of the notes to my clients in exchange for payment that they say was too low. That is the event of which they complain. None of the Minnesota contacts have anything to do with that particular claim; whether it gave me additional rights under the indenture; whether they are happy with my exercising rights under the indenture; whether they think that Tristan would have breached the indenture by issuing the notes without making them part of the indenture is all beside the point. The actual claim is based on something that was finished and accrued before there

was any contact with Minnesota of the kind that they're alleging supposedly took place on behalf of my clients. So it is not possible that that claim arises out of contacts with Minnesota. It obviously arose out of transactions that admittedly happened elsewhere. Furthermore, even if those Minnesota contacts were to be taken into account, they're just not enough. They're far too attenuated, to use the words of the case law. We don't have an allegedly affected Minnesota resident here. All we have are a few isolated -- this is the maximum even alleged -- a few isolated letters and telephone calls to the trustee's office to perform a few ministerial duties here. That's it. All of the terms of these transactions were negotiated and closed overseas between foreign parties under documents, in these particular transactions, that were governed by UK law. There's nothing about that that creates jurisdiction over that alleged fraudulent transfer claim here in Minnesota. And while I always get a headache reading personal jurisdiction cases because, frankly, it always seems to me they're thoroughly inconsistent with each other, and because I don't think the Supreme Court, quite frankly, has done a very good job of setting forth criteria that are capable of being easily applied. They're too vague. But where you get into trouble, and where you get the greatest amount of disagreement in the cases, is where you have a local resident that is party to a

loan or a contract with somebody in another state. That's where you get completely inconsistent results about is that enough, is that enough, and where it's the local resident who's actually suing. But we don't have that here. We don't have any Minnesota residents here who are suing. Okay? And the trustee is just a nominal party, as I've already, at probably too much length, gone through. So we don't have that situation that generates the kind of margins in the case law about, well, when are these contacts enough. I don't know of any case like ours, where the letters and phone calls that have been alleged are enough for somebody to say that that's enough to make it fair to take one fund that's in Cyprus and another fund that's in the Cayman Islands and a Kazakh Oil Company-related entity that's incorporated in the BVI and to bring them into Minnesota. I don't know of any case that supports that proposition. And the allegation that you should do that is directly contrary to the Supreme Court's admonition in the *Asahi* case, that you've got to be really careful about dragging foreign parties into United States courts based on isolated contacts.

One last point on this. One of the things that I don't particularly like in the phrasing of a lot of the jurisdictional tests is the standard about whether it's reasonable to expect that you will be haled into court. Because I think sometimes courts interpret that as if it's

like a proximate cause test, or something, is it foreseeable. Could you in your wildest dream imagine that somebody might do it. That's not how the Supreme Court applies that test and it's not how you should apply that test. It's not about whether it is totally unthinkable. It is: "Is it fair"? Would you reasonably expect to be haled into court. In light of due process and in light of the nature of the claim against you and the amount of contact with the forum state, would a fair-minded person say that it's right for this court to exercise jurisdiction. I think I can fairly say that the parties to this transaction would have been shocked if you told them at the time of the transaction that somebody would allege that this court would be the place where disputes about that transaction were to be considered.

Now, the last point -- well, I should back up one second. There's also an argument in the plaintiffs' papers that Tristan's contacts with the trustee about the authentication of the notes should be attributed to my clients. Again, I don't think those have anything to do with the particular claim asserted against my clients. I think they're isolated and attenuated contacts, anyway. But under your own decision in the *AXA Equitable v. Paulson* case, you don't attribute Tristan's contacts to my clients. You look at each party's own contacts, at least where there isn't a direct ownership relationship or a direct agency

relationship. Where you have people who are arm's-length parties to each other in a deal, you don't attribute their contacts to each other.

Now, the last relevant point that I need to go over is our participation in the probate court action. That was the only ground alleged in the Complaint for personal jurisdiction over my clients. Only two of my clients participated, actually, in that action. Vision did not. And the other new noteholder who's been named, Sputnik, who hasn't appeared -- I don't even know if they've been sued, actually -- if they've been served. But they also didn't appear in the probate court. Finding that that would give rise to personal jurisdiction I think would actually be contrary to what is now the final decision of the probate court itself, which held that even it did not have personal jurisdiction over us in that case, because it was just an interim proceeding. That decision is now binding on the plaintiffs. They can't challenge it here. They were parties to that case. The issue was decided against them. So participation in the probate court didn't give rise to personal jurisdiction, even there, let alone here. But even if we had submitted the personal jurisdiction in the probate court that would have nothing to do with this court's jurisdiction. The case law is clear that the only times that that has been viewed as supporting jurisdiction is where the

party is the plaintiff. We were not the plaintiff in the probate court action. We just responded to the fact that the trustee brought a proceeding. Furthermore, the whole theory of those cases is if you as a plaintiff have elected to ask a court in a jurisdiction to resolve a dispute on a particular set of operative facts, you are -- the word "estoppel" isn't used, but that's, in effect, what it is. You are estopped from saying that that court isn't an appropriate place to decide those facts. Well, all we did in the probate court was say that all these claims that plaintiffs want to adjudicate couldn't be decided here. We fought tooth and nail against the idea that they were in the slightest bit relevant to the merger of the notes, which is what was at issue. There is absolutely nothing about our conduct in the probate court that could reasonably be interpreted as an acknowledgement that any court in Minnesota was an appropriate place to resolve the issues that the plaintiffs are claiming here. It just would defy common sense.

I'm going to allow Tristan to handle its own jurisdiction argument, obviously, and Tristan will handle the argument on forum non conveniens. But I believe Tristan is right that there's no jurisdiction over it and there's no jurisdiction over my clients. Another reason to dismiss the case, then, would be that you don't have jurisdiction over necessary parties. Your decision in the *AXA* case, you quoted

another case for the proposition that it is a firmly rooted principal that if you challenge the validity -- in that case, a lease, I think it was, or an instrument or an agreement -- all of the affected parties have to be named, and they are all indispensable. And that's exactly the situation that we have here. There's an argument in plaintiffs' response that if you were to exercise jurisdiction over Tristan that would be enough to protect our interest. That can't possibly be the case. The relief that they are seeking against my clients is they want my clients to return all of the notes to Tristan and to let Tristan off the hook for those notes. I'm sure Tristan would probably like to be off the hook for those notes. It is not possible that Tristan would be the appropriate party to safeguard my clients' interests in that particular dispute. There's also an accusation that they don't need all the new noteholders because they are joint tortfeasors. Well, there's a couple things wrong with that argument. Fraudulent transfer law in some senses is treated as a kind of tort, or sometimes referred to that by the courts. But it actually is not a tort. It is a statutory action that exists for the benefit of creditors. And in this particular context, where what plaintiffs are saying is that there's joint and several liability, I don't know of any such thing under fraudulent transfer law. You are liable under fraudulent transfer law possibly to return the transfers that

you received. Because all that fraudulent transfer law does is either undo the transfer itself or require the transferee to pay damages for the value of what it got if it paid too little in the first place. There's no such thing as joint and several liability. Absolutely not. I've been litigating fraudulent transfer cases for a long time. I know of no such thing. But, also, it's an odd argument to make, because their entire argument on subject-matter jurisdiction depends on saying to you that: "Well, damages isn't really what they're looking for." Frankly, it is. And, frankly, it's all they would really need. But it depends on themselves saying to you: "Well, that's not what we're really looking for. We have to have some kind of other remedy that isn't just damages but that actually cancels the notes." Well, if you're going to look at it that way, then very clearly all of the parties to that note transaction, all of the holders of those notes and the party that issued to those notes, all would be indispensable to that claim. So if you're going to rely on that as your explanation for why Wells Fargo has to be in the case, you can't just toss it aside when you get to the necessary party issue. If that's what you're claiming, and if that's what the gist of your action is, then very clearly these are necessary parties and you can't proceed without them.

Now, there's an additional reason why the

claims need to be thrown out and that's the failure to comply with the no-action clause. As we've pointed out, at least one of the breaches that they allege about the affiliate point is not even an event of default, unless the trustee or the holders of 25 percent of the notes provide a Notice of Default with a demand for compliance. There's no allegation that ever happened. And plaintiffs didn't even respond to that. Even if there were an event of default, the proper remedy is to petition the trustee to file suit. Well, what do they say? They say, "Well, the suit's against the new noteholders." The trustee can't sue the new noteholders. Well, wait a minute. The first cause of action is against Tristan, not the new noteholders. It alleges breaches of contract by Tristan. Where's the conflict of interest there? There's none. There's absolutely no excuse whatsoever for not having complied with the no-action provisions on that point. Furthermore, as to whether the provision applies, you can say all you want about what you think the purposes of the provision are. It's worded very clearly. It says: "Noteholder may take any action" -- any action -- "to seek any relief with respect to the notes or the indenture, except by complying with these provisions." The case law in New York is very clear that that provision is strictly construed, meaning it's strictly construed. The words are enforced in accordance with what they say. In the *Drage* case that we

cited, D-r-a-g-e -- I'm sure I butchered the pronunciation -- there was a challenge to a consent solicitation, where an amendment to a loan agreement had been submitted for approval, and parties who provided consents were actually given payments in return for their consents. And some of the noteholders who didn't give consents wanted to challenge that. They alleged that it would be futile to ask for the trustee to go along, because the trustee had cooperated in the original deal, and also futile to ask for the consent of the other noteholders, because they had already agreed to it. They even accepted payment for it. The Court threw out the case. The futility had nothing to do with it. The rights that were being asserted were subject to contractual limitations. And those limitations were not complied with, so the Court threw it out. The Court did the same thing in the *Feder* case. And, then, in the *Feldbaum* case, where there's a -- which has been cited by the plaintiffs for the proposition that you should interpret this provision as if it said that it only applies if the action is for the benefit of every noteholder. That's what they cite it for. The *Feldbaum* case doesn't say that at all. It cites the convenience of having a single party enforce remedies that are ratably for the benefit of everyone as an additional purpose. But, actually, it says very explicitly that the main purpose of the provision -- the main purpose -- is to

bar suits that don't have majority support. I mean it says that explicitly. Now, here, they don't have a majority of the bonds. They claim that they have somewhere around 35 percent -- I don't remember the exact figure, I'm afraid -- of the existing notes. I think that comes out to somewhere around 28 percent of all the notes. Thirty-six percent of the existing notes and 28 percent of all the notes. Well, that's not an excuse to avoid the no-action provision.

Finally, I want to talk very briefly about the *Cyprus* decision on which plaintiffs rely, where the Court excused compliance with the no-action provision. I urge to you read that decision because it is, to be honest, a little hard to figure out exactly what the Judge is saying. But there's a couple of important differences. In that particular case -- it was a Delaware decision -- the Chancery Judge also said that the trustee was being sued because the trustee had failed to enforce a provision in a loan agreement that required 80 percent of the noteholders to consent to an amendment to the loan agreement. So he cited cases saying that the no-action provision doesn't apply where you're suing the trustee. He also said that there was a lot of force to the argument that the action in that case was to enforce that provision of the note agreement and not to enforce any provision of the indenture. We don't have any of those situations here. And what the Judge basically said is, "If

you've got a situation where you have to have 80 percent approval, I'm not going to say that that can only be enforced with the consent of more than half of the people. It doesn't make sense." That's what he said. Well, you do have conflicting provisions there, but we don't have those in our case. You don't have any of these exceptional circumstances that would excuse a compliance with the no-action provision.

The last points I want to cover are just our Motions to Dismiss two causes of action that are denominated as separate causes of actions but are really just descriptions of relief being sought, not of actual separate causes of action. The first is equitable subordination. Now, the case law that we have cited makes clear that that's a bankruptcy concept. The plaintiffs have cited some cases from New York involving lienholders. And the doctrine in New York -- and many other states, I assume -- is if you are the holder of a senior lien and you modify -- excuse me -- the debt that is secured by your senior lien, you've got to have the consent of the junior lienholder if you're affecting the junior lienholder; and if you don't, then you give up your senior lien position as to the additional amount of the debt or whatever the effect is. And that is called "equitable subrogation." Now, we've cited the *Gaymar Industries* case -- and I urge you to read that -- because it explains and cites examples of places where courts have sometimes used the words

"equitable subordination" where what they are really talking about is "equitable subrogation." And the cases that the plaintiffs cite are exactly that situation. Only one of them actually uses the words "equitable subordination," but it was in what I have described as the "equitable subrogation" context. It was where a senior lienholder agreed to a modification without getting the consent of the junior lienholder, and where the junior lienholder as a result was deemed equitably subrogated to the senior lien position. That is different from equitable subordination. Nobody is claiming junior, senior lien positions here, or anything of the kind. But even if any of that were wrong, even if it was all wrong, what plaintiffs have said is that they think that equitable subordination is a remedy under New York fraudulent transfer law. Well, you've already got a fraudulent transfer claim. Equitable subordination, if you think it's a remedy, then, fine, assert it as a remedy. It is not a separate cause of action. It doesn't belong in the Complaint as a separate cause of action or to be pursued as allegedly a separate cause of action. And the same is true of injunction. We've cited legions of cases. Injunction is not a cause of action. It's just a remedy.

I'm going to stop there, except for one last point, that plaintiffs in their papers accused us of admitting that there was some kind of merit to the rest of

the claims just because we didn't make them subject to the Motion to Dismiss. We didn't make them subject to a Motion to Dismiss just because of the limitations in the rule about when things can be subject to a Motion to Dismiss. I assure you we dispute the validity of those claims to the utmost.

Thank you, your Honor.

THE COURT: Thank you very much.

MR. ULLMAN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. ULLMAN: Your Honor, this case does not belong in this court. We have put forth in our briefs a number of independent reasons why that's so. Those points have been discussed extensively. What I'd like to do now is just highlight a few points, with particular emphasis on the issues pertaining to Tristan and, also, amplify a few things that Mr. Wiles said.

With respect to subject-matter jurisdiction, we agree with everything that Mr. Wiles said. The short answer is that there is no subject-matter jurisdiction here. Clearly Wells Fargo is a nominal party. It has no interest in the outcome of this litigation; it has no stake in the new notes that are at issue here; it has not been accused of any wrongdoing by the plaintiffs. Concededly it has only been named for the purpose of facilitating relief if the plaintiffs prevail, which is a classic hallmark of a nominal

party. And as we've pointed out in our reply memo, there's no real issue that would even require the trustee to be here. Plaintiffs now say that what they seek is the relief of cancellation. Well, that would require first for the Court to compel the new noteholders to submit a cancellation request to Tristan. And, then, if Tristan didn't follow up on that, it would require the Court to compel Tristan to submit an instruction to the trustee. At that point, the trustee would be required to cancel the notes. It wouldn't have any discretion in the matter. So there's no practical reason for the plaintiffs to even want the trustee to be named, to be present in this action. And that only further underscores the fact that their purpose in naming the trustee as a defendant here was for strategic purposes only and not because the trustee has any actual interest in the outcome of this case. In fact, the most that the plaintiffs can say is that if they prevail and if the requisites for cancellation that I've gone through are not complied with, then there exists a bare possibility that the trustee potentially, possibly, conceivably could refuse to comply with its duties under the indenture. But as was made clear in the *Rose v. Giamatti* case, which the plaintiffs rely on, the mere possibility that a named defendant might in the future commit a breach is not enough to make that party a real party, and in this case, a real defendant in interest. Ultimately, when

you sort through the papers, what you'll see is that the plaintiffs cannot, and do not, cite a single decision holding that a party in the position of Wells Fargo here is anything more than a nominal party. And we've discussed the case law extensively and I'm not going to repeat that discussion, but I would like to call the Court's attention in particular to the *Prudential* case on which the plaintiffs rely. We agree that that case is on point, but it supports our position, not the plaintiffs'. In the Prudential case -- which is a Ninth Circuit 2000 decision -- certain named defendants held shares of stock. Those defendants had previously wanted to keep the stock for themselves. I believe there was an arbitration proceeding which held that those particular defendants weren't entitled to it. And, then, the federal court action arose. And the question in the federal court action was who's going to get the stock and it was either going to be the plaintiff or the co-defendant. And the only question before the Court was which of those two parties was going to get the stock. Now, the parties that held the stock had previously sided with the co-defendant and acknowledgedly wanted the co-defendant to win. They had a preference for the co-defendant to be the victor in the litigation, but they, nonetheless, acknowledged that they'd have to turn over the stock to whoever the Court held was entitled to have it. And on those facts, the Court held that the parties holding

the stock were nominal parties for diversity purposes. And in this case the trustee's position is, if anything, even clearer. Like the nominal parties in the *Prudential* decision, the trustee has no interest in the litigation. If, at some point in the future, it is called upon to act, if the Court tells it to do something or if the law requires it to do something, it's made clear that it will do whatever the Court or the law requires. And in sharp contrast to the parties who were held nominal in the Prudential case, the trustee has no preference as to who wins or who loses here. You heard counsel for the trustee say last time that they don't care. They're even concerned about sitting on that side of the courtroom because they don't want any impression that they're favoring one side or the other. So on the law and the facts, your Honor, Wells Fargo clearly is a nominal party only. It's presence cannot be considered in determining whether diversity jurisdiction exists. Without Wells Fargo, there is no diverse U.S. citizen on the defendants' side of the caption. Accordingly, there's no diversity jurisdiction and this action must be dismissed.

With respect to personal jurisdiction, your Honor, the plaintiffs, as you know, have conceded that there is no general jurisdiction over Tristan. So the question is whether this court has specific personal jurisdiction over Tristan. As we all know, for specific personal jurisdiction

to lie, the claims alleged have to arise out of, or relate to, Tristan's contacts with the forum state, Minnesota. And that test is not, and cannot be, met here from either a state law or a constitutional perspective. And I'm going to touch on the state law issue first. As Mr. Wiles has observed, while the plaintiffs clearly, and for obvious reasons, prefer not to focus on it, the fact is that there is a state long-arm statute that discusses the circumstances in which a non-resident can be subject to Minnesota jurisdiction in diversity cases, and the requisites of that statute have to be met. So the question is what, then, does the long-arm statute say. Well, the only prong of the long-arm statute that could even arguably apply here is Section 543.19(d), which allows the assertion of jurisdiction over a person who, quote, commits any act outside Minnesota causing injury or property damage in Minnesota. Now, plaintiffs certainly have alleged wrongful conduct that took place outside of Minnesota, but there's no allegation and no prima facie showing of any resulting injury or property damage that occurred in Minnesota, as the long-arm statute requires. And, clearly, there can't be, because no plaintiff is a Minnesota resident. Not a single one. Now, plaintiffs try to avoid the import of the long-arm statute by arguing that it extends to the limit of due process so that the actual terms of the statute don't really matter. Well, the long-arm

statute does matter, it does exist, and its terms have to be met under the law. We've cited cases in our briefs, including federal cases, dismissing for lack of jurisdiction based on the long-arm statute. In the *Digi-tel Holdings* case, which is 89 F.3d 519, an Eighth Circuit 1996 decision, the Court explicitly stated that for personal jurisdiction to exist "the facts presented must satisfy the requirements of the forum state's long-arm statute." So while it may be true that the long-arm statute is co-extensive with due process, what that really means is that the terms of the long-arm statute extend the limits of jurisdiction to the bounds of what due process allows. But it is equally true that where the terms of the long-arm statute cannot be met then, under a due process analysis, you've exceeded what's permissible under the Constitution. So in this case, because the plaintiffs cannot come within the terms of the long-arm statute, cannot make a showing of jurisdiction under the state law, the analysis can properly end there. There's no personal jurisdiction over Tristan under the state long-arm statute and this alone requires dismissal of the claims against it.

Now, to the extent that the Court chooses to consider the jurisdictional analysis from a constitutional perspective -- which it doesn't have to do -- the outcome is no different. On the one hand, plaintiffs' claims arise from

what they contend was the wrongful sale and issuance of the new notes which took place overseas in 2009. And, also, although they don't really focus on it, in Count IV of their Complaint they allege that in 2010, I believe it is, Tristan failed to make payments that were due to the existing noteholders under the terms of the existing note. The existing noteholders, of course, none of whom are Minnesota residents. So that's what the claims are. That's what they arise out of it. On the other hand, the contacts that the plaintiffs allege between Tristan and Minnesota have nothing to do with those claims. So what are the contacts? Well, first, the plaintiffs point to some marketing activities for the existing notes -- not the new notes, the existing notes -- that plaintiffs say took place in 2006 and 2007 and included, but were not focused on, some potential purchasers in Minnesota. Now, those asserted activities, which concerned the existing notes and took place at least three years before, before the new notes were even issued, clearly have absolutely nothing to do with the new notes or the wrongful conduct relating to those notes, to their issuance and sale, that the plaintiffs allege occurred in 2009. And those asserted activities in 2006 also have nothing to do with the plaintiffs' claims for repayment, since the plaintiffs are not Minnesotans and did not purchase the existing notes in this state. Second, plaintiffs point to

various administrative duties that the trustee, who, of course is located in Minnesota, assumed in connection with its obligations as trustee under the indenture. But the plaintiffs' claims don't arise because the trustee performed any administrative duties in Minnesota. Those duties were, at best, at best, ancillary to the indenture, and have absolutely nothing to do with the claims that the plaintiffs have asserted against Tristan. And equally important, those asserted contacts, the activities, the administrative actions, the ministerial activities by the trustee in Minnesota, do not show any activities by Tristan in this state. In the *Scullin Steel* case -- that's an Eighth Circuit, 1982 decision -- an informed seller sued a non-resident buyer for breach of contract. In the course of their dealings, the parties had engaged in telephone and mail communications, and there was payment and delivery of goods under the contract that had been made in the forum state. And this was a case where the plaintiff had, in fact, manufactured the goods in the forum state. And in holding that the Court lacked specific personal jurisdiction, it wrote: "It is the defendant's contacts with the forum state that are of interest in determining if in personam jurisdiction exists, not its contacts with a resident." Regardless whether the trustee did anything administratively, as it clearly did in connection with the indenture in

Minnesota, Tristan didn't do anything. Tristan's contacts with Minnesota are far less than those that were held constitutionally inadequate in *Scullin*. And likewise, to the extent that the plaintiffs are contending that specific jurisdiction exists because Tristan from time to time sent communications into the state, gave instructions to the trustee concerning the performance of its administrative duties, those communications clearly are not what give rise to the plaintiffs' claims. The law is clear that merely contracting with an in-state party is insufficient to support jurisdiction, that's among other things, the Supreme Court's decision in the *Burger King* case. And the law is also clear that merely sending written communications into a state is constitutionally insufficient to support jurisdiction. And that's made clear in a host of cases we've cited in our brief from the Eighth Circuit and the District of Minnesota, including the *Mountaire*, *Scullin*, *Austad*, and other cases. And they're all in the briefs.

Third, the plaintiffs refer to the authentication instruction that Tristan sent to the trustee following the issuance of the new notes by Tristan. But, again, that is simply a written communication sent from outside the state and is constitutionally insufficient for this reason. And, further, it was written after the sale and issuance of the new notes took place. It was written after

the event that the plaintiff says give rise to its claims. And, thus, for jurisdictional purposes, it's wholly irrelevant. The claims that the plaintiffs are asserting here against Tristan arise, again, from the sale and issuance of the new notes outside the state, and from Tristan's failure to make a payment -- the alleged failure -- on the existing notes. All of that took place outside of Minnesota, and none of that was in any way based on Tristan sending the authentication instruction to the trustee.

On the law, your Honor, the plaintiffs have conceded that they cannot meet the effects test that was set out in the *Calder v. Jones* decision of the Supreme Court, which can support jurisdiction when there's an alleged wrongful act outside the state that causes an injury to a plaintiff inside the state. So that leaves the plaintiffs on the jurisdictional front with having to show acts by Tristan in the state that gave rise to, or relate to, their claims such that Tristan, who, of course, is a foreign defendant, a BVI company, should reasonably have expected to be sued here in Minnesota. And as Mr. Wiles pointed out, in assessing that issue, the Court needs to keep in mind that Tristan is indeed a foreign company and is subject to the special considerations that the Supreme Court articulated in the *Asahi* decision that demand prudence and restraint when a foreign defendant is sued in the United States.

So for all the reasons I've gone through, and as we've set out in the briefs, the plaintiffs here cannot come even remotely close to meeting their burden of making out a prima facie showing that jurisdiction exists. And this indeed can be seen from the cases that they cite. When you read the cases that are cited by the plaintiffs, they all have two things in common, the first is that they all involve a forum plaintiff. Of course, here, not a single plaintiff is from this state. And second, all of the plaintiffs' cases involve a breach of contract between the forum plaintiff and an out-of-state defendant, where the defendant performed in the state or otherwise conducted activities such as soliciting the plaintiff or breaching the contract in the state. So in those cases there is no issue that jurisdiction was present. It was. Here, on the other hand, none of the plaintiffs is from Minnesota, which is the forum state. The claims do not arise out of a breach of contract between Tristan and a Minnesotan plaintiff, and there is no allegation of a breach of a contract involving the solicitation or performance or breach by Tristan in Minnesota. So plaintiffs' own cases only further confirm what we believe was already clear, that specific personal jurisdiction over Tristan does not exist.

With respect to the Rule 19 motion, the failure to join necessary parties, I don't have much to add to what

was already said by counsel for the new noteholders. Clearly, plaintiffs are seeking to affect the rights of all the new noteholders and, indeed, to cancel their rights under the new notes. In those circumstances, even if there were jurisdiction against Tristan -- which there isn't, because there is no jurisdiction over any of the new noteholders -- proceeding with this action would violate their rights, I believe it's constitutionally impermissible, and certainly impermissible under the strictures of Rule 19.

With respect to the no-action clause, again, I'm just going to add a few things to what counsel for the new noteholders said. This clause applies to all of the claims that have been brought against Tristan, with the exception of Count IV, which is the one for nonpayment of the existing notes held by the existing noteholders. I don't believe that that particular claim is subject to the no-action clause, but all of the other claims against Tristan are. Contrary to what the plaintiffs would like the Court to believe, this type of provision, a no-action clause, such as the one contained in 6.06 of the indenture, is not mere boilerplate. It serves an important purpose and that purpose, as described by the American Bar Foundation, is the purpose of preventing individual holders from bringing independent lawsuits for unworthy or unjustifiable reasons. It was said a little differently in the *Feldbaum* case in

which the plaintiffs rely. The *Feldbaum* court said that a no-action clause protects against, quote, the exercise of poor judgment by a single bondholder or a small group of bondholders who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest. Well, that's exactly the purpose that's served here. As Mr. Wiles has gone through, when you look at the allegations concerning the aggregate amount of existing notes and new notes, and the 150 million in notes that the plaintiffs say they hold, the existing noteholders have about 79 percent of the total of all the notes -- I'm sorry -- the existing notes are about 79 percent of the total of all notes. And the plaintiffs themselves hold about 36 percent of the existing notes and 28 percent of the notes as a whole. Thus, either way you look at it, the plaintiffs are a minority seeking to assert claims that even the majority of existing noteholders apparently find baseless and not in their collective economic interest. Their reliance on the *Feldbaum* case, the Delaware Chancery decision, is misplaced. In *Feldbaum*, the Court noted three exceptions to a no-action clause, the first is where the trustee itself is accused of wrongdoing. That, of course, is not the case here. The second is a situation where the noteholders allege that they were fraudulently induced to purchase the notes so that the fraudulent inducement would

include inducement -- or -- the fraudulent inducement to sign onto the no-action clause. That's not the case here, either. And the third exception noted by *Feldbaum* is where the claims were brought by persons who used to be noteholders but had since sold out and were not presently noteholders, meaning that the trustee wouldn't be in a position to represent their interests. And that's not present here either. So the three exceptions that were recognized in the *Feldbaum* case, the only three exceptions -- the application of the no-action clause that the Court in *Feldbaum* recognized -- do not apply as regards Tristan. Nor is there any argument that asking the plaintiffs to comply with the no-action clause would be futile. As the cases that plaintiffs cited make clear, futility can be invoked as an excuse to compliance with a no-action clause only if the trustee itself has already been accused of misconduct or has already stated its substantive agreement with the action being challenged. That hasn't taken place. Or it can be held futile if the party seeking to avoid using the no-action clause holds all the bonds -- which, obviously, it wouldn't make any sense. But that's not the situation here. On the contrary, the plaintiffs are just the minority. And, finally, regardless of the merits of the contention that the trustee would be put in a conflict-of-interest position if it had to assert claims as against the new noteholders -- which we don't really see -- that argument

on its face is inapplicable, has absolutely no application to the claims that the plaintiffs have asserted against Tristan. So under the plain terms of the contract -- or -- the plain terms of the indenture, the no-action clause applies to all of the claims against Tristan except for Count IV, and that all of them must be dismissed for failure to state a claim.

Finally, I'm going to touch briefly on our position on forum non conveniens. I'm not going to dwell on it at length, because I think the proposition is fairly self-evident, because I think the claims against Tristan alternatively, if the case is not dismissed on other grounds, should be dismissed on grounds of forum non conveniens. Tristan is a British Virgin Islands, BVI, company. The BVI is an alternative available forum. The BVI, as we've pointed out in our reply papers -- and this is available from the U.S. government, and the CIA fact book -- it's on the Web -- follows English law. So there can't be any contention that they wouldn't have a remedy in a BVI court. And it's equally clear that, at least as regards Tristan, Minnesota is not a conveniens forum under the standards that this court must look at in assessing the forum non argument.

Looking at the private factors, Minnesota plainly is not convenient for Tristan, which doesn't do any business in the U.S., and certainly has no presence in Minnesota. It's not even convenient for the plaintiffs.

None of them come from Minnesota. The action was filed here only because the trustee is here, and the trustee is just a nominal party not accused of any wrongdoing.

For the claims that are asserted in this action, there are no witnesses in Minnesota. Subpoena power of this court does obviously not extend to witnesses outside the state or overseas. And as the indenture itself, I believe, noted -- or -- maybe it's one of the associated documents -- we've pointed it out in our papers, there's at least a question whether any judgment rendered in this state would be enforceable overseas.

Looking at the public factors, the Minnesota body public clearly has no interest in a Minnesota court hearing claims brought by non-Minnesota plaintiffs against a BVI company, based on alleged misconduct, that all took place outside of Minnesota and is not governed by Minnesota law. So we don't think the plaintiffs have any viable claim against Tristan. But to the extent that they're seeking to assert one anyway, it does not belong here, and there is no impediment to plaintiffs bringing a claim against Tristan in the BVI. And, therefore, your Honor, if the action against Tristan -- if the claims against Tristan are not dismissed on other grounds, as we think they should be, they should be dismissed under principles of forum non conveniens.

Thank you, your Honor.

THE COURT: Thank you. We're going to take about 15 minutes. We're going to come back at about three o'clock.

THE CLERK: All rise:

(Court stood in recess at approximately 2:50 p.m., and reconvened at approximately 3:05 p.m.).

THE COURT: Mr. Fisco:

MR. FISCO: Good afternoon again, your Honor.

THE COURT: Good afternoon.

MR. FISCO: The parties agree on one thing, there are essentially two issues regarding the Motions to Dismiss, one, is Wells Fargo a necessary party for purposes of subject-matter jurisdiction; and two, could Tristan, and the new holders as the parties who created Laren to facilitate the transactions that are at issue in this lawsuit, reasonably have expected to be summoned to the United States; specifically, the state of Minnesota, to litigate indenture issues. The answer to both questions is yes. This is not a simple escrow agent, two-page agreement. This is an indenture of trust regarding the issuance of almost over a half a billion dollars worth of debt. In order to understand the issues and the rights of the parties, you have to understand first the role of the indenture trustee. The trustee is essentially a creature of contract. When companies like Tristan want to access debt markets in the

U.S., they must do so through an indenture of trustee -- or -- they often do so through an indenture of trust. A trustee, like Wells Fargo, is appointed to represent the interest of the holders and administer the rights of all of the holders under the indenture. So, essentially, you have the trustee that is in place. That's why it signs the agreement and it signs the indenture. And the notes that are issued are freely tradeable. They're not identifiable. The notes are paid through DTC, the Depository Trust Company, in New York. And Euroclear is a similar function in the european markets, where the notes will trade and the payments are made. The indenture trustee is put in place and contracted to represent the interest of the holders. So it is the only other party to the agreement, other than Tristan, if there is a breach-of-contract action, as the Court held in other cases, the two parties to the agreement are, by definition, necessary parties. We agree -- and we'll get to this a little bit later -- that the rights and interest of the holders have to flow through the indenture. And that's precisely what's going on here. We have to pursue the claims against Tristan and Laren and, indirectly, the new noteholders, through the indenture, because we're pursuing the claims on behalf of all existing holders and the trustee has to administer those rights. It is absolutely necessary to this litigation and to the Court's rulings, determinations

and implementations of any remedies in this litigation.

THE COURT: That might be the case. But you're not alleging some independent wrongdoing on the part of the trustee.

MR. FISCO: No. The trustee didn't do anything wrong, your Honor; but, more importantly, the trustee is the party who was wronged. The trustee should, in ordinary circumstances, be the plaintiff in this case and it's not, because it needs to represent the interest of the holders. And the reason that it's not the plaintiff in this case, and the reason that it hasn't been pursuing remedies for over a year, is because it has a conflict of interest with respect to the holders.

THE COURT: But if it were the plaintiff, as counsel pointed out, who would they be diverse with who was a defendant?

MR. FISCO: It doesn't matter. They're the defendant in this case because they're not doing anything. And the reason is the no-action clause.

THE COURT: With each other; is that what you're saying? I don't understand.

MR. FISCO: Excuse me?

THE COURT: Doesn't there have to be diversity between the plaintiffs and the defendants?

MR. FISCO: In this case there is diversity

between the plaintiff and the defendant. Because the trustee in this case has to be the plaintiff, because it has not acted in light of an event of default, it has not acted in light of the breaches of contract.

THE COURT: And if the trustee should be aligned as a plaintiff, who is the diverse defendant?

MR. FISCO: The diverse defendant in this case -- I agree, your Honor, it's highly unusual -- I've been doing this for 25 years. It's highly unusual that the trustee is not taking a position. And it has to be the defendant because it is not taking a position because, indirectly, the remedies that are sought here go against other holders. So the trustee is in a conflict position.

THE COURT: So the trustee should be a plaintiff, a Minnesota resident, and the diverse defendant is the trustee, a Minnesota resident.

MR. FISCO: Under the facts of this case, the defendant, the party to which the existing noteholder, plaintiffs, seek a remedy, is the trustee, because the trustee is not acting. It did not do anything wrong with respect to issuing the new notes because it was not required to investigate the officer certificate that was given to it, saying it complied with the indenture. And Section 412 of the indenture didn't apply because it wasn't an affiliate transaction. It's entitled to rely on those. So it didn't

do anything wrong, but it was the party that was harmed. And it is not doing anything with respect to those breaches because it can't, because there's two sets of holders, the holders that benefited from the wrongful transaction, and the holders that were harmed by wrongful transaction. It's paralyzed to act. So under the unique circumstance of this case, it has to be the defendant. We didn't create those facts. It's the trustee that's not acting. So, in this case, we are seeking very specific relief against the trustee. And we have to because the trustee is failing to act. And if we walk through the indenture provision, you'll see why there are ongoing, continuing duties. And the trustee is not doing anything with respect to events of default, because it has to determine whether or not this was a violation of Section 412 -- we think we've already proved that -- and if that's the case, the effective remedy or partial remedies will be against other holders. So it's paralyzed. So let's walk through the indenture provision, because it's a complicated document. Section 701 says: "If an event of default has occurred, and is continuing, the trustee will exercise such of the rights and powers vested in it by this indenture, and use the same degree of care and skill in its exercise as a prudent person would exercise or use under the circumstances of the conduct of such person's own affair." An event of default exists right now. It

didn't exist at the time of the issuance, but it exists right now. Had Tristan not lied in its officer certificate, the trustee would have. If the officer said: "This violates Section 412," and the trustee still issued the notes, there would have been a claim against the trustee. But that's not what happened. As part of its rights, it is entitled to rely on the officer certificate and it is not required to investigate it. That fact is irrelevant because the harm still occurred. And the harm occurred under the indenture, and the indenture trustee was the party that was harmed, even though it was entitled to rely on it, and didn't have to investigate. And, ultimately, the harmed party, the trustee, represents the interest of the holders. And for that specific transaction, the only holders that existed were the existing holders. So we are the aggrieved party, and we have to go through the indenture trustee to enforce our rights and the trustee can't, because the trustee can't be in a dispute where it's going to be fighting about which one of its holders gets certain cash or which one of its holders' notes should be canceled because of the circumstances of Tristan's breach of the agreement.

THE COURT: I don't think anybody is challenging whether you have a right to proceed. I think what they're challenging is whether you have a right to do that in this forum.

MR. FISCO: I think we do have a right to -- well, first of all, I think we are challenging whether we have a right to proceed, because that's what the no-action clause is. Let's jump to that for a second. Let's look at Section 6.06 because that's a key provision as it relates to the trustee and the holders. It says: "Except to enforce the rights to receive payment of principal and interest, no holder of a note may pursue any remedy with respect to this indenture or the note, unless they first make demand on the trustee." Holders of at least 25 percent. And I'll note, it's not 50 percent as counsel for the defendant said. It's 25 percent. And the existing holders represent 35 percent of the note. So that requirement is met. We can direct the trustee. Then we have to offer security or indemnity. And the trustee has 60 days to comply with it. And the only circumstances where the trustee doesn't follow it is a holder of a majority and aggregate principal amount of the outstanding notes give contrary direction. The key provision is the last sentence that was not discussed by the defendants. It says: "A holder of a note may not use this indenture to prejudice the rights of another holder of a note or to obtain preference or priority over another holder of the note." That is precisely what has to happen in this case because they were wrongfully issued. The trustee can't follow the direction. We cannot direct the trustee. We have

the ability and the power and everything. But it says specifically the trustee cannot take that direction because it is involving other holders that are holders under the same indenture. That's the conflict. A very unique situation. And I've been doing this for over 20 years. That provision is not in many of the indentures. If you look at the *Feldbaum* decision, it doesn't have that provision in there. It's a very specific provision. And the trustee cannot act if it's going to have a preference or priority over one holder versus another. So we're left with it doesn't apply. Section 6.06 does not apply. But that begs the question. It doesn't answer it. We still have to exercise all of our remedies and all of our rights through the trustee. It is the only party to the agreement.

If we look at Section 412 and apply some of the facts here, it's key. 412 basically says: "The company and the guarantors will not make any payment to, or sell, lease transfer or otherwise dispose of any of its properties or enter into or amend any transaction, contract, agreement, understanding, loan, advance, guarantee, any transaction with an affiliate unless the affiliate transaction, if it's in excess of one million dollars, is a no less favorable terms to the company than if it were a comparable transaction with a nonaffiliate." That's not applicable here, because it's more than a million. And it goes on to say: "If the company

delivers to the trustee, that if it's a three million-dollar transaction, it has to be approved by a disinterested director." The disinterested director has resigned as a result of this transaction. And that's in the Complaint. So they couldn't have met that. The third one says: "With respect to an affiliate transaction or a series of related affiliate transactions involving aggregate consideration in excess of ten million dollars, an opinion as to the fairness of the company from a financial point of view issued by an accounting, appraisal or investment banking firm of national standing." Both 2(a) and 2(b) apply in this circumstance and they couldn't comply with it. They had no independent director and they had no opinion. So it's absolutely proven in the facts without discovery that they did not -- and subsequent to the issuance of notes -- this is an important fact -- subsequent to the issuance of notes, all these facts started coming out. The auditors for Tristan have concluded that Laren, the entity under which they conducted this transaction, is, in fact, an affiliate. And the noteholders have conceded, after the transaction, that they had some interest and involvement in creating Laren to facilitate this transaction. So Tristan and the new noteholders got together, created Laren to create this transaction that violated Section 412. If you look at the nature of the transaction, the new notes of a hundred and eleven million

dollars were actually issued for no additional consideration. There were several entities involved in this transaction -- Tristan, Laren, its affiliate, Montvale, its affiliate, TNG and KPM, the guarantors, and also guarantors of the existing notes, as well. There was a 60 million-dollar loan transaction from the new noteholders to Laren. That loan transaction, $30 million went upstream to Tristan, $30 million went to Montvale. But they're entitled to repayment of the entire $60 million, and guaranteed by the only two operating subsidiaries of Tristan. So they get their $60 million back plus 35 percent interest. In addition to that, they get a hundred and eleven million dollars of notes. So they actually paid no consideration for the notes, because all of these entities are part of an affiliated group of entities. The conduct of Tristan and the conduct of the noteholders are one and the same. The trustee, because they are now a noteholder, and it didn't notice when it issued the notes -- and it was entitled to rely on it -- so it did not do anything wrong up to that point. It had to rely, and it did, but it was false. So what's the remedy available to the existing noteholders who were the parties that were damaged? They have to pursue a claim, and they have to pursue a claim in this court. And the trustee has to be a party to it because we are now required to make the trustee act in a fiduciary capacity for only a portion of the notes. It has

to be involved in this claim. It's the only party under which we can act; it's the only party that can pursue remedies; it's the only party that can enforce the liens that are the stock certificates of the two entities that guaranteed the debt, TNG and KPM; it's the only entity that can pursue that. We have no right to do that, even if we tried to do that. There's different provisions of the indenture which restrict a holder's right to receive anything other than principal and interest when due. It's not lost that nothing has happened in a year and a half, because Tristan and the new noteholders have paralyzed the trustee into taking no action at all. They have to be involved.

They said the new noteholders asserted this is not ripe for adjudication. It's absolutely ripe for jurisdiction. We have an existing event of default. And Section 7.019(a) of the indenture provides that the trustee must act to represent the interest of the holders in event of default and must act as a fiduciary. It's not happening. So we have to bring this action in order to get it to act as a fiduciary. What does that involve? We don't know. We don't have any of the discovery. We do know that we want them to not make any distribution until these issues are resolved. And if you look at the distribution provisions -- which are very relevant -- Section 6.10, Priority. "If the trustee collects any money pursuant to Article 6" -- which is

collection after an event of default -- "it shall pay out the monies or properties in the following order, first, to pay its fees and expenses, then to holders of the notes ratably without preference or priority of any kind according to the amounts due and payable on the notes for principal, interest, fees and costs." So it has specific instructions as to what to do. This court has to say, "You can't follow that." "Because of the fraudulent transfers, because of the nature of the thing, you cannot distribute any money until I" -- your Honor is done ruling on the merits of this litigation.

THE COURT: You make a very compelling case, and you did last time, about whether there's any wrongdoing underneath here. The question is do I have subject-matter jurisdiction and personal jurisdiction. That's the heart of it. And you're right, they argue in a no-action provision you can't bring this action. But let's get to the heart of jurisdiction here.

MR. FISCO: The heart of jurisdiction is all remedies have to flow through the trustee. We started this action because the trustee was paralyzed to do so. So from this point forward, the trustee has a continuing fiduciary duty to represent the interests of all holders. This court is going to have to have the trustee here to respond to what it can do; what it's willing to do; what it's not willing to do. And there are other provisions of the indenture that say

the trustee doesn't have to act if any action has been involved with personal expense or expose it to personal liability. The trustee can assert that, regardless of what the Court does, because the trustee is going to say: "I have to go to another country to enforce this judgment," yet there's a specific instruction that says you can't distinguish between holders. You have to distribute all sums ratably without preference or priority of any kind according to the amounts due and payable on the notes. That's one provision. The second provision at issue here is the rights of the holders. They are entitled to receive principal and interest due on the notes. And we cannot do anything with respect to collecting against the operating subsidiaries because the liens are held by the trustee exclusively. Section 6.07 says: "Rights of the Holders to Receive Payment." It clearly identifies that holders can receive principal and interest when due. And, then, it goes on to say: "provided that a holder shall not have the right to institute any such suite for the enforcement of payment if the prosecution results in the surrender, impairment, waiver or loss of the lien on this indenture upon the property subject to this lien." These are just some of the examples of a very complicated indenture directing the trustee on how to implement and enforce the rights on behalf of all holders. That has to be part of this litigation. And the trustee is

entitled to say: "I'm willing to do that." "I'm not willing to do that." This is not even feasible. It's even been further complicated because now the notes have been transferred.

THE COURT: But this trustee, apparently -- and I'll ask him in a moment -- doesn't intend to take any position in this matter.

MR. FISCO: Exactly.

THE COURT: I think this trustee is just waiting for direction from this court or any court for an adjudication of the issues and then will follow.

MR. FISCO: It's not that simple, your Honor, because now the notes have been transferred. Now there's good-faith purchasers for value. What's fair? Shouldn't the trustee, as the party with the fiduciary obligation, be able to say: "That's not fair"? And on behalf of all the holders, and as the trustee responsible for administering the rights of those holders, in light of this event of default, this holder did not have any involvement in this. This holder paid fair consideration. This holder should not be subject to a ruling of the court. If the existing defendants continue to hold, it's easy, the trustee should be directed to cancel. I agree. Some of the remedies that could possibly be implemented in this case, the trustee would implement, without question, once the Court found that

Tristan violated the indenture and the new noteholders were the beneficiary of a fraudulent transfer. But we don't know where this is going to go. The trustee as the party that's responsible for the fiduciary obligation going forward has to have an opportunity to say: "I can't do that, your Honor." If the Court says: "Go do this," and it's not possible, it's not an effective remedy, because they are the party to the agreement, and they are the party with respect to rights on behalf of all the holders. And the Court's ruling would say: "Okay, trustee, you don't have to represent the new holders' interest," except we have this issue with good-faith purchasers for value. That may have happened because the new noteholders traded. If we got monetary damages from them, it's less of an issue. If we don't get money damages from the new noteholders, there's going to be some kind of equalization that has to come up or some kind of further investigation. "Did you know"? "Were you a good-faith purchaser for value"? "Are you an affiliate of Tristan"? Are you an affiliate of Stati"? "Are you an affiliate of one of the new noteholders"? Those are all issues that have to be adjudicated and dealt with. And the trustee is the party to which the Court should be directing those questions, and the trustee should be answering those. We have no ability to control the remedies, we have no ability to control the distribution. We are not a party to the agreement. We are

standing in the shoes of the trustee for the sole purpose of instituting this action. The trustee is responsible for the fiduciary duties going forward once the Court determines that it was a fraudulent transfer. That's why the trustee is a necessary party in interest.

Let's then move to personal jurisdiction over Tristan. They say that Section 543.19, the long-arm statute, there was no transaction of business in Minnesota. They assert that were no acts in Minnesota, and they assert there was no injury in Minnesota. None of that is true. There was a fraudulent officer certificate delivered to the trustee as a Minnesota resident upon which it acted that caused injury to the parties the trustee was contractually obligated to represent as a fiduciary. It doesn't matter that there wasn't an event of default at the time because the fraud concealed the event of default. Had Tristan advised the trustee, "By the way, we ignored the affiliate transaction, Section 4.12, the trustee wouldn't have been able to issue the new notes. They would have been issued in violation of the indenture. If the new noteholders and/or Laren and/or Tristan would have said, "Oh, by the way, we're breaching our debt covenant under Section 4.10," they wouldn't have been able to issue the notes and the trustee would have never authenticated and delivered the notes. So it's all part of the same theories and the same part of the transaction.

Tristan chose to come to the United States to access investors for the first $420 million. Tristan retained Jefferies, a U.S. investment banking firm, of national reputation. They had road shows in Connecticut, New York, Los Angeles, Minnesota. In Minnesota, they solicited CarVal Investors, Whitebox Advisors, Wayzata Investment Partners, Deephaven Capital, and Varde Partners. This is not just a phone call to Minnesota or a letter to Minnesota. They are in Minnesota dealing, trying to sell a bond, and using the U.S. markets to raise funds for its own purposes. CarVal, in fact, advised certain of its funds to invest in both tranches, which constitutes the existing notes. That's all in the affidavit of Chapman, paragraph six, Ramli, paragraphs eight and ten. And some of that is even confirmed by Tristan's own affidavits, their contacts with Minnesota. In addition to the solicitation, Tristan executives visited Minnesota. The Tristan CEO, Anatol Stati, and CFO, Artur Lungu, visited Minnesota in September, 2006 to discuss the possibility of Wells Fargo to act as trustee. Tristan chose to enter into an indenture with Wells Fargo in Minnesota, a resident of Minnesota. Tristan, then, twice amended the indenture, sending documents and communicating with the trustee here. Tristan named Wells Fargo as the registrar, paying agent, and custodian under the indenture. Tristan maintains an office in Minnesota, required under the

indenture. It's their document. They're the ones that said: "Let's do that in Minnesota with the trustee." The indenture requires Tristan to maintain an office or agency where notes may be surrendered for registration of transfer or for exchange, and where notices and demands to or upon Tristan in respect to the notes of this indenture may be served. Its agent is in Minnesota. It contacted a Minnesota resident to act as its agent, and it has an office in Minnesota, through its agent, for those purposes. It's not a letter. That's not a phone call. That's a visit to Minnesota. That's a contract with a company in Minnesota, and that's maintaining an office through that contact in Minnesota. They purposely designated Wells Fargo offices in Minnesota to fulfill this function. Tristan maintained continuous contact with Minnesota after that. They agreed to send notices or communication to Wells Fargo in Minnesota. Annual compliance certificates were delivered to the trustee in Minnesota. Tristan agreed to deliver to the trustee in Minnesota any notices of events to default. Tristan agreed to deliver to the trustee in Minnesota a fairness opinion in their Board resolution in conjunction with any affiliate transaction. It wasn't done here. But all of those deliveries are to the trustee in Minnesota. Tristan issued notes on three occasions -- October, 2006 for 300 million, June, 2007 for 120 million, and in June, 2009 for 111 million. Before each

issuance, Tristan delivered to the trustee in Minnesota an authentication order, notes for signing by the trustee, an officer certificate, and an opinion of counsel. And the key is the officer certificate, with respect to the issuance of the 111 million-dollar note, was false. That's a harm to a Minnesota resident, that caused harm in Minnesota, and that was delivered to a Minnesota resident in Minnesota. That's the harm in Minnesota that the Court can rely on for subject-matter jurisdiction and personal jurisdiction over Tristan. Tristan contacted the trustee in Minnesota in June, again, with respect to issuance of the new notes. That is the basis of the lawsuit, that is the basis of the fraud, and that occurred in Minnesota.

THE COURT: Not to dispute this too much, but I think what the defense is saying is that even if this were true, the fraudulent officer certificate didn't cause harm to a Minnesota resident. It caused harm to you guys.

MR. FISCO: It caused harm to us. And they're our agent, your Honor. That's what the indenture provides. They have a fiduciary obligation to us. They are the party through which we act. They hold all of our rights. There can never be harm to the trustee in any circumstance. It doesn't have a note. And it's entitled to rely. The indentures aren't drafted for fraud. They're drafted to let the commerce go forward. They access the U.S. capital

markets. These transactions happen all the time. They're not based on fraud. The trustee shouldn't be required to, and they shouldn't pay the trustee to, investigate every fact and every officer certificate. That's what those provisions are designed for. And when they don't work because the issuer commits fraud, the trustee was harmed, because the trustee is our representative.

THE COURT: I don't have any trouble seeing how the trustee would be harmed, if that's true. I have a hard time seeing why that matters, because you're the plaintiff.

MR. FISCO: We're not the plaintiff. We're the plaintiff, standing in the shoes of the trustee, solely for bringing the action. And once the Court determines it, the trustee has to go back to administering all of the rights and obligations. As we've just talked about, we can't guess today what the appropriate remedy might be. We can't guess today who the other holders are. We are not seeking damages against the defendants individually. We are seeking damages for all existing holders through the trustee. It's a critical issue. We're not asking them to pay us fees and expenses, we're not asking them to pay us principal and interest due on the notes. We're asking for the trustee to implement this -- to basically pay the trustee for the damage that you caused the trustee as the representative of all the existing noteholders. It's critical. There's no other way

to pursue this. It has to go through the trustee. And it has to be here. We can't drag the trustee to the British Virgin Islands and say: "Now you have to defend a lawsuit instigated by Tristan." And there's plenty of contact for Tristan in Minnesota to justify exercise of personal jurisdiction. For similar reasons, the Court has jurisdiction over the new noteholders. They were the creditors of Laren. Laren is an affiliate. They were involved in every aspect of this transaction. The defendants want you to say: "Let's put some of these facts over here, and let's put some of the facts over there, and let's not look at the indenture," "And then we can say there's no contact with Minnesota." It was one fraudulent scheme conducted in one transaction, a 60 million-dollar loan that was guaranteed by all the affiliates, $111 million in notes issued fraudulently to them, and they were working with Tristan. They also came back to Minnesota and said: "Now, we don't like definitive notes." And there's a difference between a global note and a definitive note. A definitive note is specifically held by the trustee in the name of the holder. And the facts and circumstances -- and, again, this is without discovery -- Laren was the one that purchased the notes, yet they were delivered to the new noteholders. Why, if Laren was the purchaser of the notes for the $30 million, were they delivered directly to the creditors of Laren?

Because this whole Laren facility is a sham transaction, concocted both by the new noteholders and by representatives of Tristan. It's one fraudulent scheme. And that's why Tristan's contacts with Minnesota should be imputed on them. Because then they came back individually and asked the trustee -- said: "We don't like the definitive notes. Let's put them into a global note," and the trustee said: "Okay, give me all the requisite information and the requisite requests from Tristan and the new noteholders to put it into a global note." Well, the trustee did that. They provided the documentation. Again, the trustee didn't know that it was fraudulent, didn't know that the notes were issued fraudulently. The trustee complied. So now there's two global notes with separate CUSIPs. Again, you can distinguish the existing notes from the new notes. Well, that wasn't good enough for them. They wanted the trustee -- they came back again to Minnesota, and said: "Let's merge them now." And each time there were officer certificate requests. And they specifically benefited from the contacts in Minnesota. They came to Minnesota because it facilitated their desire to make these notes indistinguishable from the other notes so they can trade it on the market.

Let's go back to what we talked about earlier. The trustee is up here and these notes trade. Now they're all trading under one CUSIP, and a buyer can't distinguish,

because there's no separate CUSIP number and they're not definitive notes. They all look the same. The Court has to ask: "Why would they spend so much time and effort to make those notes virtually indistinguishable from the other notes"? Because they wanted to essentially say: "We can just launder this fraud, and we'll sell the notes, and we're out of it." So we have to have jurisdiction over them, because they did come to Minnesota to further facilitate the fraud by getting definitive notes first, transferring those for global notes second, and then ultimately -- which was the issue in the probate court -- having the two global notes merged under one CUSIP number so they can finally complete the fraud. And they did appear, and they asked for very specific relief in the probate action. They moved for summary judgment. They didn't appear and say: "We contest jurisdiction." They were the party -- because the trustee was neutral in that action, as well. They were the party that carried the ball, filed the Motion for Summary Judgment that got them the relief that they wanted, and the Court in the probate action had a very limited scope. Based on the language of the agreement, was the trustee required to merge the notes, and the answer was yes. The Court specifically held it is not dealing with any of these issues. They have accessed and used and benefited from their contacts in Minnesota, and they are also imputed with all because of the

insider relationship and because of the affiliation of these parties, they are also imputed with the contacts of Tristan -- which are significant -- from a due process standpoint and from a long-arm statute standpoint.

I'll briefly address forum non conveniens. The only party that benefits from moving this to BVI is Tristan and makes it, again, difficult for every party to pursue remedies. Tristan would love to have this action just go nowhere and to paralyze the trustee for as long as possible, because no remedies can be pursued except through the trustee. And you can see that in their argument. On the one hand, they're saying: "Oh, you have a right to pursue whatever you want." On the other hand, they're saying: "You have to pursue it through the trustee because you're bringing an action on the indenture." It's exactly what they want. They can't speak out of both sides of their mouth. This is the proper proceeding. We are not seeking a benefit for just us, we are seeking a benefit for all holders, consistent with the fiduciary duties of the trustee. The harm in this case was directed as the trustee as the representative of the holders. Tristan submitted a false officer certificate to the trustee in Minnesota, causing harm to all existing holders. That's the key to this case.

Equitable subordination, briefly. The equitable subordination claim is well-founded. I won't cite

the cases that we have in the brief. New York law recognizes it in a circumstance where there's actual fraud. The case that they cite deals with constructive fraud. This is not a case of constructive fraud. This is a case of actual fraud. And, again, we will refer the Court to our brief for any further points or arguments on that issue.

Unless the Court has any questions....

THE COURT: I don't. Thank you.

MR. FISCO: Thank you.

THE COURT: Brief response, Mr. Wiles?

MR. WILES: Yes, your Honor. Your Honor, I want to try to start with the subject-matter jurisdiction point. Some of the argument that Mr. Fisco made -- I don't mean this to sound wrong, but I feel like I'm shooting at a moving target a little bit, because there are arguments that he made about what they're seeking, whose rights they are asserting; why they are asserting them, what the alleged fraud was, that are nowhere to be found in the Complaint in this case. So rather than have that all kind of just sitting out there -- I apologize, since I already spoke for a very long time before, I'm going to try to be very methodical about responding to what he said, and where it is and is not, based on what's actually in the Complaint. Now, one of the things that Mr. Fisco said was that the trustee should be a plaintiff, and that they're bringing this case because of the

trustee's refusal to act. All right. Now, when you say that, it suggests that what you are doing is suing the trustee, claiming the trustee has behaved badly, and that you are seeking a remedy against the trustee because of the trustee's own bad behavior. There is not a hint of any such allegation in the Complaint in this case. And at the same time that Mr. Fisco made that comment, he also openly acknowledged to you that he is not claiming that the trustee has breached any duty or that he is suing the trustee for violation of any responsibility in the indenture. So this idea that we named them because they refused to act, well, it's words that sound like why you name a real party in interest. But if you get underneath it and say: "Well, okay, are you accusing them of something"? No, they're not. It's nowhere in the Complaint. They have openly acknowledged, even here, that the trustee did not behave wrongly. Well, they say that the trustee is the only one who can enforce liens. What does this case have to do with the enforcement of liens? It has nothing to do with the enforcement of liens. They say: "Well, the trustee's got heightened duties and it's got more responsibilities because there was a payment default in July of 2010." Well, this case isn't about that, except the cause of action about collecting interest. And if anything is clear, it's that they can sue on their own to try to collect payments due to

them. They don't need the trustee for that. So what does that default have to do with anything. What Mr. Fisco said was, in effect, this is a derivative action. That, in effect, he is here in the name of Wells Fargo, asserting rights that belong to Wells Fargo under the indenture, and that he's doing it only because Wells Fargo has been silent or it just has been inactive or because it can't effect. Well, that's interesting. I certainly don't get any of that in the Complaint. There is nothing in the caption or in the allegations of the Complaint that says that these plaintiffs are suing in the name of Wells Fargo and for the benefit of anybody other than themselves or to assert rights that belong to anybody but themselves. Page one of the Complaint lists the individual funds who are plaintiffs and defines them as plaintiffs or the existing holders.

The prayer for relief. Damages in favor of the existing holders, these plaintiffs, to the extent that they have been damaged by Tristan Oil's and the new holders' alleged acts and omissions.

An injunction against merger of the notes -- which is irrelevant now.

An injunction against distributions on the new notes. That's the classic stakeholder example. Every single nominal party case that we have, the nominal party is there just to direct that the funds that it receives or holds go to

one party instead of another.

Permanently enjoining the new holders from selling their notes. Well, that's gone. That's already happened.

Avoiding the sale and issuance of the new notes. They don't need the trustee for that. The trustee does a ministerial job of following the direction by Tristan and the new holders.

And, then, they have their equitable subordination relief.

There's nothing there that requires the trustee or that amounts to a right that belongs to the trustee that they are attempting to enforce or that purports to be a derivative claim. I don't know of any authority that says that a noteholder can stand in the shoes of the trustee and appoint itself to do that. The noteholder either has its own right or it doesn't. It doesn't get to come in and say: "I am Wells Fargo." And that is an credible allegation to arise for the very first time in the argument of a Motion to Dismiss, having never appeared in the Complaint itself or in the argument of the injunction or in the extensive briefing on the Motion to Dismiss. That's simply not what is happening in this case.

Mr. Fisco repeated the comment that all the remedies flow through the trustee. And this is the same

language that's been used throughout the existing noteholders' brief, and it was used during the injunction. And I have to tell you, I just don't know what that is supposed to mean. Yes, if the trustee had been a plaintiff or were instructed to be a plaintiff might be seeking to enforce remedies. I spent as much time as I could when I was up here the first time going through every single thing that they alleged the trustee was supposed to do here, whether distributing money, canceling a note when it's submitted for cancellation, every single involvement that the trustee would have in the relief that they seek. And it's just like every other case that we've cited to you, where the Courts have held very consistently that those parties are just nominal parties. And to return to the point, they're nominal because it doesn't matter if you think the relief you're seeking from them is important. You have to have a cause of action against them. Jurisdiction is not based on who it would be convenient to have in the case to effectuate relief. Jurisdiction is based on the causes of action and who the parties to those are. And, very clearly, those claims are not with Wells Fargo. Then we have the argument that: "Well, this is a derivative case, so Wells Fargo is really the plaintiff here. It's only nominally the defendant." You hit the nail right on the head. If that's true, that doesn't solve your diversity issue. Just putting it on the

defendant's side of the equation, but saying that, in effect, you are here, and the only reason it is here is so that you, the plaintiffs, can assert rights that belong to Wells Fargo itself, is a classic case where you, under the Supreme Court authorities, have to realign the parties. And you would simply treat Wells Fargo as a plaintiff in that case. There is no real U.S. party as a defendant.

Now, the next point that they alleged was that the reason that they're asserting rights that belong to the trustee is that the trustee can't do so. And I want to read to you more carefully the language of the provision that they cited that supposedly says that. And it's in Section 6.06 of the indenture, which says that -- it was just the provision that we cite the beginning of -- that says: "No holder of a note may pursue any remedy..." unless it does certain things. Well, what Mr. Fisco said was that the trustee can't pursue the claims that the holders want to assert here because it would prejudice the new noteholders and, therefore, he, as the holder of other notes, can pursue those claims. But what the actual sentence says is: "A holder of a note may not use this indenture to prejudice the rights of another holder of a note or to obtain a preference or priority over another holder of a note." Now, what he has told you -- this is their words, not mine -- is that that is the relief that they are seeking. He himself has said in his argument that the

relief they are seeking would prejudice the rights of another holder of a note and give one set of noteholders a preference or priority over the others. He's affirmatively represented that to you. And he said to you that the trustee cannot pursue that claim. I submit to you that on the plain language of the indenture itself, he cannot pursue that claim. It couldn't be clearer. "A holder of a note may not..." do this. And with that admission by the plaintiffs that that is what directly they are trying to do, I submit to you that by their own characterization of their claims this action must be dismissed.

Now, as to personal jurisdiction, Mr. Fisco went to great lengths to say that we, my clients, the new noteholders, were involved in the creation of Laren, therefore, we could expect to be subject to a lawsuit about the creation of Laren. The problem is the claim against my clients have nothing to do with the creation of Laren. That's the claim against Tristan. My clients are not a defendant in that claim. If you look at Count II of the Complaint, which is the fraudulent transfer claim, it says -- paragraph 78 -- "Tristan Oil's sale and issuance of the new notes was a fraudulent conveyance because it was made by Tristan Oil with the actual intent to hinder, delay and defraud the existing holders." Paragraph 79: "Tristan Oil's sale and issuance of the new notes was a fraudulent

conveyance because" -- and, I'm sorry, but I do have a method to this madness. Please bear with me as I read it --

Subparagraph a: "The new notes were sold and issued by Tristan Oil when it was insolvent or it became insolvent as a result thereof." Well, that's something that happened when the notes were sold.

B: "When the new notes were sold and issued, Tristan Oil intended to incur, believed or reasonably should have believed that it would incur, or knew that it would incur, debts beyond its ability to pay as it became due." Well, there it is again, "...when the new notes were sold and issued..."

C: "The new notes were sold and issued by Tristan Oil without receiving reasonably equivalent value and exchange." There it is again. That happened at the time of the issuance.

And D: "The new notes were sold and issued by Tristan Oil to the new holders without fair consideration." There, again, it's at the time of sale.

Then there's an allegation that the sale has damaged the existing holders -- which, by the way, are defined as just these plaintiffs. Not everybody.

Now, in his argument, Mr. Fisco said that, well, we were involved in the creation of Laren, so we're somehow involved in the creation of the fraud. I read that

Count, I see nothing that has anything to do with Laren as far as the fraudulent transfer is concerned. Everything about that allegation has to do with the terms on which the notes were sold and the financial circumstances in which Tristan found itself. It has zero, absolutely zero to do with Laren's existence or participation or role in any single part of this transaction. Similarly, Mr. Fisco said that the merger of the notes was part of some dastardly scheme to hide their origin -- which is just -- I'll tell you, all it is is an effort to take advantage of the market, that's all it is. But he said, therefore, it's a part of the fraud. What fraud? The fraud that we're inventing when every time the issue comes up and we have a new theory of what the case is? There's no allegation against my clients here that the merger of the notes was part of a fraud committed by my clients. The claim against my clients is fraudulent transfer. And as I've just made clear, by reading through the allegations, that's a claim that's based on the issuance of the notes themselves. It has nothing to do with bringing them under the indenture and with the merger of the notes. Similarly, saying that Tristan's efforts to sell the existing notes in 2006 are part of the same transaction and are binding on my clients for due process purposes, I don't even think I -- I hope I don't even have to respond to that. It's ridiculous. My client's had nothing to do -- they weren't on the scene.

They had nothing to do with the sale of the existing notes in 2006 and are not chargeable with any of those contacts.

Next was the allegation that there was an alleged harm in Minnesota. And I'm confused by the answer, because the answer seemed to be that, yes, without equivocation, the trustee was not itself injured. The people who were injured were the non-Minnesota residents who are plaintiffs in this case. But either because the indenture trustee is their agent or because they're standing in the indenture trustee's shoes that somehow changes things and makes it an injury in Minnesota. Well, if I'm injured and I have an agent somewhere else, that doesn't mean I'm injured where that agent is. I'm still injured where I am. That doesn't change the place of the injury. So alleging that Wells Fargo is your agent doesn't solve your personal jurisdiction problem because it still doesn't give you an injury in Minnesota. Similarly saying that you want to stand in Wells Fargo's shoes doesn't change where the injury is. The important part of the admission there was that Wells Fargo itself was not hurt, was not injured. The people claiming injury here, and the only ones for whom relief is actually sought in this Complaint, are these individual plaintiffs suing in their own right. In fact, I find it very odd to hear all this argument about how the plaintiffs here are somehow just taking over Wells Fargo's position. Because

up until now, the whole gist of their brief was that they didn't need Wells Fargo, that they were entitled under the indenture to take action on their own, and that the no-action provision didn't apply, and that it was perfectly okay to assert their own rights. This is an entirely new way of looking at the whole thing that isn't even consistent with the Complaint.

Finally, on the point about what happened in the probate court, and did we seek relief. Summary judgment is not relief. Defendants seek summary judgment all the time. It throws a case out. It's not a form of relief that you seek. The important thing is we did not initiate any proceeding in Minnesota or anywhere else, nor did we, by our conduct in the probate court, do anything that reasonably could be interpreted as an agreement or acknowledgement that a court in this state has jurisdiction over us personally or is an appropriate place to resolve the issues that the plaintiffs wish to raise.

I think I have responded to everything, your Honor. If you have any questions for me, please let me know.

THE COURT: Thank you. Does Tristan's counsel wish to be heard?

MR. ULLMAN: Your Honor, with respect to subject-matter jurisdiction, as counsel for the new noteholders said, we heard now for the first time that the

plaintiffs contend that they're really just going through the trustee, I guess in some way suggesting that their claims are derivative, or something. I'm not really clear. What I am clear on is that they said things in their Complaint and that's what this action is about. However, they try to spin it now. And what they said in their Complaint is that they are asserting individual claims against all the parties, including, in particular, Tristan. These are individual claims. They're not derivative claims, they're not agency claims. They're nothing else except individual claims for which, among other things, the plaintiffs are seeking individual damages.

Count I is for breach of contract against Tristan. What do they say in paragraph 76? "As a direct and proximate cause of Tristan Oil's alleged breaches of the indenture, the existing holders have been damaged in an amount to be determined at trial."

Count II is for fraudulent conveyance. That's also alleged against Tristan. They also contend that they were injured. They contend they were injured individually against all of the defendants except the trustee. Yet, at the end of the day, when you look in the relief section and the non-substantive Counts, where the trustee is brought in for injunctive relief, they're seeking some sort of remedy. But that's all it is is a remedy only. They're seeking

individual claims -- or -- asserting individual claims against all the defendants. The trustee is simply there to facilitate relief. That is the exact type of conjectural and speculative claim against a nominal party that's been disallowed in the cases that we've cited in our papers, including, but certainly not limited to, the *Rose v. Giamatti* case, which I've already discussed. The claim against the trustee is for facilitating relief. It is hypothetical only. It doesn't constitute a claim against the trustee for diversity purposes. They are nominal.

With respect to jurisdiction, it is also clear from the Complaint -- and, again, despite how plaintiffs might now like to spin it -- that their claims arose out of the sale and issuance of the new notes and, also, with respect to Count IV from the alleged nonpayment. That's what's said in Count I. It says that Tristan Oil entered into a valid and binding agreement where it agreed to do -- or, rather, not to do certain things. And, then, they go on in paragraph 75 to say: "When Tristan Oil sold and issued the new notes, it breached Section 4.10 and Section 4.12 of the indenture because..." and then it goes on to allege what they say are the actions constituting breach. Now, of course, we don't agree with what the plaintiffs are saying. And while we're not going to get to the merits now, because this isn't the appropriate time to do so, the Court should

have some flavor from the papers that were submitted on the preliminary injunction motion that the charges that they're making are wholly untrue. And they keep referring to Laren as an affiliate. The only evidence before this court is that it wasn't. But that's an aside. Because for these purposes, we'll assume what they say is true. But if you assume what they say is true, you have to also assume that the alleged wrongs took place where they're alleged to have occurred, which is outside of Minnesota. There is no contention that the new notes were sold or issued in Minnesota. There is no contention that Laren is a Minnesota company. There's no contention that anything relating to what is contended to be the alleged breach of contract that the plaintiffs are suing on had anything whatsoever to do with Minnesota. And the same thing is true with the fraudulent conveyance, unjust enrichment and other causes of action that are alleged in the Complaint. And it's also true of Count IV, which is for nonpayment. There is no contention that these plaintiffs entered into a purchase of the notes with Tristan in Minnesota or that any of them is even a Minnesota resident and was not paid in Minnesota. So the question, then, for jurisdictional purposes is: "Well, what happened in Minnesota"? and the answer is "What happened is absolutely nothing that has any bearing on the claims." The only thing they can even point to is the instruction letter to the

trustee, but that took place after the events that gave rise to the claims in the Complaint. And, indeed, I don't even have to look at the Complaint to do that. That's what plaintiffs themselves said on this very motion. If you look at page 39 of their brief in opposition to our Motion to Dismiss, the plaintiffs say -- and this is in the first full paragraph -- and I quote -- "The sale and issuance of these notes" -- to the new notes -- "is the wrong that gives rise to the existing holders' claim for relief." I'm not putting words into their mouth. I'm not trying to spin what they're saying. I'm simply reciting what they have represented to the Court, which is exactly the same thing as what they've said in their Complaint. In any event, as we've gone over before, and in our briefing, the law is clear that sending a communication into the state is not enough to support personal jurisdiction. That is true under the state long-arm statute. For example, in our briefing, we've obviously talked about Section 543.19(d), which says that you have to have injury in Minnesota. And there's only wrongful conduct alleged overseas here. The other sections we've also talked about in our brief and they're not enough to confer jurisdiction, either. Section 543.19(c) gives jurisdiction over someone who commits an act in Minnesota causing injury or property damage. But that doesn't apply because the cases make clear that sending a document from outside the state to

someone inside the state is not committing an act in the state, for purposes of that section. We've cited the *Northwest Airlines* case and, also, the *Wheeler v.* -- I think it's *Tufail* case. Those are Minnesota state cases for that point. There's also Section 543.19(b), which confers jurisdiction over someone who transacts any business within the state. Now, we've heard the suggestion that sending the instruction letter might be transacting business in the state. Well, it's not. The cases say that. And we cite for that proposition the *North American* case, that's a federal district case, and *Anderson v. Mattson,* again, that's a District of Minnesota case. So the law is clear that no matter how you slice it, no matter how they try to come at it, you can't get in the long-arm statute. And if you can't get in the long-arm statute, you can't come under the due process clause, either.

And with respect to the due process clause -- I'm not going to go through that analysis again -- but what I seem to be hearing at the end of the day is, despite the prior disclaimer, the plaintiffs really are relying on *Calder v. Jones*, which they previously said doesn't apply. Because that's all they can say at the end of the day is that, "Hey, maybe there was a letter sent." "Okay, the letter wasn't what gave rise to the claims, but we're going to cite to it anyway." Well, even if you can get past that initial hurdle,

it's not enough, because under *Calder v. Jones*, the defendant has to intentionally target the state. Here, obviously, Tristan wasn't targeting anyone in the state because the plaintiffs are all from outside. And one of the critical elements of *Calder v. Jones* is there has to be injury to a resident of the forum state and they can't get past that hurdle, either, here. As Mr. Wiles said, just alleging that the trustee in some inchoate way was harmed doesn't cut it. I don't know how the trustee could possibly be harmed. The trustee is not a holder of any notes, and is not acting as the agent for any particular noteholder. And, as Mr. Wiles said, that couldn't be imputed outside the state, in any event.

With respect to the no-action clause, I would agree that the last sentence doesn't help the plaintiffs, both for the reasons that -- that's the last section, Section 6.06 -- for the reason that counsel for the new noteholders pointed out -- which, if anything, it just demonstrates why the plaintiffs should not be here, and why this action should not go forward -- but, in any event, doesn't apply to Tristan. So, in all events, the no-action clause applies in full force with respect to Tristan.

And that leads into the last point, which is the forum of non conveniens, which is, if they are going to sue Tristan at all -- and we don't think they should. We

don't think there's any basis for the claim. But if there's going to be a suit by them against Tristan, it should be in the BVI -- in the courts of the BVI, and it would have to comply with the terms of the contract. We're not talking out of two sides of our mouth. We're not saying: "If you sue us in the BVI, we'll forget about the no-action clause." If they're going to sue us anywhere, in anyplace where the jurisdiction can be found, they're going to have to comply with the contractual requirements. If they were to sue us in the BVI, without having complied with the requirements of the no-action clause, I believe we would make the same argument there that we're making here, they're independent.

But, in any event, and for all the reasons that I've gone through, this case does not belong in this court.

Thank you, your Honor.

THE COURT: Mr. Fisco.

MR. FISCO: A couple points, first, the Complaint speaks for itself. It's well-pled. I'm not going to walk through each of the provisions of the Complaint. And as to the remedies, it's not a moving target. The remedies and relief will necessarily depend on the circumstances of this case. From the last hearing to now, we were asking to enjoin distribution of the notes -- merger of the notes so they wouldn't be distributed. Now we're dealing with innocent third parties that may be purchasers; maybe not,

maybe. We don't know what the relief is going to go (sic), but we can't adjudicate or judge jurisdictional issues on a Motion to Dismiss without having any of those facts and understand the facts and circumstances of this case. It's just inappropriate. Two, if I've misstated that the trustee failed to act, let me clarify the record. The trustee has not acted. And it has not acted because it cannot act. It's in conflict with the indenture. If you take the provision of Section 6.06, as the defendants have interpreted, what they're saying is: "We can do anything we want. And as long as we give it to another holder, and we have this provision in there, there is no remedy." The trustee has no job except to represent the interest of its holders, particularly in an event of default. What purpose is that hundred-page document if the trustee isn't required to do something if there's a breach of the agreement.

Let's go back to the no-action clause -- I mean, the limitation on suits, because it's very, very specific. I've been doing this for over 20 years. I've watched this case law develop. And if you go back to *Feldbaum v. McCrory*, that's the seminal case on it. And after the Judge goes through what's the purpose of a no-action clause, there's two types of actions, there's an individual holder right and, then, there's rights that harm everyone jointly and equally ratably. As to the first -- and

I'll give you an example -- a securities fraud claim that is very specific to one holder, that the company sold it based on misrepresentations to that holder. That's not an action that arises under the indenture. And if you go through that whole line of cases on the no-action clause, it will tell you that. It's not barred by the no-action clause because the remedy and the relief is specific to the individual holder, much like the right to collect principal and interest. The only thing that the holders get in this case -- they didn't even get it -- there's a global note, and that global note has nothing other than a right to principal and interest. All of the rights of the holders are contained in the indenture. So what they're suggesting is that we can't enforce those rights. Of course we can enforce those rights. We have to enforce them consistent with the terms of the indenture. And this line of cases on the no-action clause came into existence because there were strike suits. And if you go and read all of the cases and read them side by side and watch the development of this, they're distinguished between rights that are for the benefit of all holders and someone trying to beat everyone else to the courthouse and get paid on their notes first. If it's a remedy that's available to the trustee for the benefit of everyone, what the indenture says and what the no-action clause says that's a right that has to be pursued by the trustee and, then, the

limitation on suits applies and you have to go through Section 6.06. As to individual rights, like to collect principal and interest due on just your note, you can go ahead and do that. They don't need permission from anyone. If that's what the holders were trying to do here, they could have done it, and they would have just said: "Pay me my note." That's not the issue here. They are pursuing remedies for the benefit of all of the existing holders under the indenture. They have to do that through the idenure and they have to do that under the circumstances set forth in the indenture. And the trustee is paralyzed to take it. And that's what makes Section 6.6 not applicable here. And if you go to *Feldbaum*, after it talks about all the purpose of what the no-action clause is, the Court very specifically and very succinctly addresses this. And I'll just read into the record. "I do not mean to imply" -- after the court said this is barred by the no-action clause -- "I do not mean to imply that courts will apply no-action clauses to bar claims where misconduct by the trustee is alleged." Not alleged here. We agree. "For the same reason that equity has long recognized that in some circumstances corporate shareholders will be excused from making a demand to sue upon corporate directors but will be permitted to sue in the corporations' names themselves, bondholders will be excused from compliance with the no-action provision where they allege specific facts

which, if true, establish that the trustee itself has breached its duty under the indenture." Again, doesn't apply here. The key is the next provision. "Or is incapable of disinterestedly performing that duty." That's exactly the situation here. And if you follow the cases, the distinction is between rights for the benefit of all holders under the indenture versus the individual rights -- individual securities fraud claims, individual right to collect principal and interest. This is not the individual pursuit of rights, these are breaches of contracts that can only be pursued through the trustee as the party to the agreement governing the rights of all holders.

I'm not going to repeat all the arguments. I will state, though, very clearly that the fraudulent certificate that is the basis of the issuance of the notes was delivered to a Minnesota resident in the state of Minnesota. I don't think the Court needs anymore than that for personal jurisdiction or subject-matter jurisdiction.

Finally, the new holders voluntarily participated and obtained relief from the probate court. No one required them to come. They filed a Motion for Summary Judgment, and they voluntarily appeared and they benefited from that appearance. They can't now say: "Oh, we didn't really" -- "we just had to come and state our position through a Motion for Summary Judgment. The trustee wasn't

taking their position. It was the existing holders versus the new holders, the two parties that disputed that. So we think they clearly have contacts with Minnesota independently of Tristan and, again, with Tristan as joint tortfeasor under the Laren facility, it's very clear.

Thank you, your Honor.

THE COURT: Thank you. Anything further? Anybody else need to be heard? This is a complicated matter. The Court will study it carefully and take it under advisement. Court is adjourned.

THE CLERK: All rise.

(Court stood in recess at approximately 4:15 p.m., on April 7th, 2011).

CERTIFICATE PAGE

I, Ronald J. Moen, an Official Court Reporter for the District of Minnesota, CSR, RMR, and Notary Public, do hereby certify:

That the said MOTIONS HEARING was taken before me as an Official Court Reporter for the District of Minnesota, CSR, RMR, and Notary Public at the said time and place and was taken down in shorthand writing by me;

That said MOTIONS HEARING was thereafter under my direction transcribed into computer-assisted transcription, and that the foregoing transcript constitutes a full, true and correct report of the MOTIONS HEARING which then and there took place;

That I am a disinterested third person to the said action;

That the cost of the original has been charged to the party who ordered the transcript of the MOTIONS HEARING, and that all parties who ordered copies have been charged at the same rate for such copies.

That I reported pages 1 through 93.

IN WITNESS THEREOF, I have hereto subscribed my hand this 15th day of April 2011.

s/Ronald J. Moen
RONALD J. MOEN,
OFFICIAL COURT REPORTER,
CSR, RMR